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How Juries Get It Wrong - Anatomy of the Detroit Terror Case

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I. INTRODUCTION

Juries make mistakes. We know this intuitively and empirically. Juries have acquitted guilty people[1] and convicted innocent people.[2] The reasons for jury error are as varied as the reasons for human error generally.[3] Jury errors may be attributable to factors intrinsic to a jury's makeup, such as the jury's attitudes, beliefs, and decision-making competence, which may skew its ability to evaluate the evidence accurately and apply the law fairly.[4] Thus, for example, a jury's determination of the facts may be influenced by sympathy, passion, and prejudice.[5] Similarly, a jury's evaluation of a witness's credibility may be distorted by the jury's subjective assessment of the witness's back-

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1. *See* H. Richard Uviller, *Acquitting the Guilty: Two Case Studies on Jury Misgivings and the Misunderstood Standard of Proof*, 2 CRIM. L.F. 1, 2 (examining "the unaccountable acquittal of a person almost certainly guilty of a crime of the utmost gravity"); WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH 201 (1999) ("Probably everyone is familiar with some juries' stunning acquittals or failures to convict in important cases in recent years."). There have been several sensational trials that much of the public would characterize as "false acquittals." *See* Patricia Hurtado, *Crown Heights Jury: Why It Didn't Add Up; Murder Trial was Marred by Missteps*, NEWSDAY, Nov. 8, 1992, at 7 (acquittal of Lemrick Nelson for murder); John L. Mitchell & Jeff Leeds, *Half of Americans Disagree with Verdict; Reaction: High-Voltage Joy, Angry Denouncements*, L.A. TIMES, Oct. 4, 1995, at A1 (acquittal of O.J. Simpson for murder); Richard T. Pienciak, *Twelve Who Need to Get a Clue*, N.Y. DAILY NEWS, Nov. 12, 2003, at 4 (acquittal of Robert Durst); Christopher Reed, *Death in the Family; Hollywood Is Where the American Dream Is Fabricated but This Time Hollywood Has Produced a Real Life Story About the Dream's Darkside*, GUARDIAN (London), Oct. 11, 1993, at 2 (trials of Lyle and Eric Menendez for murder); Amy Wallace & David Ferrell, *Verdicts Greeted with Outrage and Disbelief; Reaction: Many Cite Videotape of Beating and Ask How Jury Could Acquit Officers.* L.A. TIMES, Apr. 30, 1992, at A1 (acquittals of four Los Angeles police officers for beating Rodney King).

2. The numerous exonerations of convicted defendants based on newly-acquired DNA evidence demonstrate that juries have mistakenly relied on defective identification evidence in rendering guilty verdicts. *See* NAT'L INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 2 (1999) (" [M]ore than 60 convictions in the United States have been vacated on the basis of DNA results."); EDWARD CONNORS ET AL., U.S. DEP'T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996) (evaluating twenty-eight cases in which DNA evidence established post-trial innocence).

3. Jury error, as discussed in this Article, is the result of mistakes in evaluating the evidence and applying the law. Such "factual error" should be distinguished from errors that result from a verdict that a jury considers "right" or "wrong" based on the jury's sense of justice and morality. *See* THE STORY MODEL OF JURY DECISION-MAKING AND THE "JURY NULLIFICATION PROBLEM," THE JURY TRIAL IN CRIMINAL JUSTICE 269 (Douglas D. Koski ed., 2003) (providing comprehensive discussion of "jury nullification").

4. The complex and controversial subject of jury decision-making has been studied extensively. *See, e.g.*, INSIDE THE JUROR (Reid Hastie ed. 1993); VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY (1986); REID HASTIE ET AL., INSIDE THE JURY (1983); HARRY KALVEN, JR. & HANS KELSON, THE AMERICAN JURY (1971).

5. *See* HANS & VIDMAR, *supra* note 4, at 131 ("Critics have also claimed that the jury is swayed by subjective emotions, that its verdicts are often based upon unwarranted and irrational sympathies and prejudice.").

ground, narrative, language, and demeanor.[6] Finally, a jury's capacity to reach a reliable decision may be impaired by defects in the jurors' memory, perception, and cognition.[7]

Apart from intrinsic errors, jury error also may result from factors extrinsic to the jury's attitudes, beliefs, and decision-making competence. Typically, these extrinsic errors relate to the nature and quality of the information that has been presented to the jury as well as the manner in which that information has been presented by the lawyers.[8] Thus, for example, if the evidence is defective or incomplete, or its presentation has been skewed by partisan advocacy, mistakes by a jury are inevitable.[9] Indeed, even if a jury has the intellectual and emotional competence to receive and analyze the proof dispassionately and accurately, its verdict is only as trustworthy as the reliability of the proof itself.

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6. Subjective biases may be most acute when jurors evaluate the testimony of children, identification witnesses, experts, and cooperating witnesses. *See* Dana D. Anderson, *Assessing the Reliability of Child Testimony in Sexual Abuse Cases*, 69 S. CAL. L. REV. 2117, 2117 n.1 (1996) (claiming that of the thirty child sexual abuse cases that went to trial in the1980s, more than half of the convictions were reversed on appeal for tainted testimony of child witnesses); Ayre Rattner, *Convicted but Innocent: Wrongful Conviction and the Criminal Justice System*, 12 LAW & HUM. BEHAV. 283, 289-92 (1988) (describing a study of more than two hundred felony cases of wrongful conviction that found misidentification to be the single largest source of error, accounting for more than half of cases that had one main cause); United States v. Amaral, 488 F.2d 1148, 1152 (9th Cir. 1973) (expert usually viewed by jury with an "aura of special reliability and trustworthiness"); Ellen Yaroshefsky, *Cooperation With Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917 (1999) (describing how prosecutors and their agents manipulate the testimony of cooperating witnesses to make these witnesses appear more believable to the jury).

7. *See* Richard J. Harris et al., *Memory for Pragmatic Implications from Courtroom Testimony*, 6 BULLETIN OF THE PSYCHONOMIC SOC'Y 494, 496 (1975) (mock jury study reveals "discouraging reflections of jurors' memories of courtroom testimony").

8. Studies of simulated jury decision-making reveal potential "extrinsic" errors resulting from the introduction of inadmissible evidence, improper opening statements, improper summation, improper cross-examination, and the impact of missing evidence. *See* Stanley Sue, Ronald E. Smith, & Cathy Caldwell, *Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemma*, 3 J. APPLIED SOC. PSYCHOL. 345 (1973) (finding direct correlation between influence of inadmissible evidence and strength of government's case so that inadmissible evidence most prejudicial when government's case weak); Thomas A. Pyszczynski & Lawrence S. Wrightsman, *The Effects of Opening Statements on Mock Jurors' Verdicts in a Simulated Criminal Trial*, 11 J. APPLIED SOC. PSYCHOL. 301 (1981) (suggesting that jurors unduly affected by prosecutor's strong opening presentation of evidence); Judy Platania & Gary Moran, *Due Process and the Death Penalty: The Role of Prosecutorial Misconduct in Closing Argument in Capital Trials*, 23 LAW & HUM. BEHAV. 471 (1999) (juries exposed to improper prosecutorial statements in closing arguments recommended death penalty significantly more often than those not exposed to statements); Saul M. Kassin, Lorri N. Williams & Courtney L. Saunders, *Dirty Tricks of Cross-Examination: The Influence of Conjectural Evidence on the Jury*, 14 LAW & HUM. BEHAV. 373 (1990) (presumptuous cross-examination questions significantly diminished jury perception of expert's credibility); Tina M. Webster, Heather N. King & Saul M. Kassin, *Voices From an Empty Chair: The Missing Witness Inference and the Jury*, 15 LAW & HUM. BEHAV. 31 (1991) (references to absent witnesses have prejudicial impact on jury when witness is central to case).

9. Extrinsic factors that might impair accurate jury decision-making also include conduct by the trial judge in administering the trial, ruling on evidence, and instructing the jury on the law. *See* BENNETT L. GERSHMAN, TRIAL, ERROR, AND MISCONDUCT §§ 1-8, at 3-119 (Lexis Law Publ'g 1997) (describing the various types of errors and misconduct committed by judge during trial); Peter David Blanck, Robert Rosenthal, & La Doris Hazard Cordell, Note, *The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials*, 38 STAN. L. REV. 89 (1985) (discussing how trial judges' verbal and nonverbal behavior influence jury verdicts).

Ideally, then, if (1) a jury has the competence to receive and evaluate the proof objectively and intelligently; (2) the evidence accurately reflects the factual issues to be proved; (3) there is no additional evidence that would cast doubt on the reliability of the factual determinations; (4) the attorneys have contested those issues fairly and thoroughly; and (5) the jury has been properly instructed on the applicable legal principles and is able to comprehend and apply those principles, then we may be confident that the fact-finding process has functioned properly and the jury's verdict is free from error.[10]

The fact-finding process, needless to say, does not always function in such an ideal manner. A recent, high-profile, federal criminal jury trial offers a unique opportunity to examine how the fact-finding process can be impaired not by flaws that are intrinsic to the jury's decision-making competence, but, rather, by extrinsic factors. In the Detroit "Sleeper Cell" terrorism trial—the first and only post-9/11 conviction by a jury of terrorism-related charges—the jury heard compelling evidence linking the four defendants to terrorist activities.[11] Although the trial was conducted in an emotionally charged atmosphere[12] that was fueled in part by the government,[13] the jury's verdicts were supported by the evidence and appeared to be arrived at consci-

10. The assumption that juries are competent to understand the judge's legal instructions and apply those instructions is questionable. *See* Nancy Pennington & Reid Hastie, *The Story Model for Juror Decision-Making*, *in* INSIDE THE JUROR, *supra* note 4, at 200 (judges' instructions are "usually abstract and often couched in unfamiliar language," and present juries with "a difficult one-trial learning task" that is difficult to follow); HANS & VIDMAR, *supra* note 4, at 126 ("[J]urors may not always be able to follow the law as it is intended to be followed.").

11. *See* Ronald J. Hansen, *Feds: Guilty Verdicts Validate Terror Hunt; Critics: Split Convictions Point to Weak Evidence* DETROIT NEWS, June 4, 2003, at A1 (providing overview of the trial).

12. *See* United States v. Koubriti, 305 F. Supp. 2d 723, 728 (E.D. Mich. 2003) (observing that "tensions and sensitivities were extremely high in this area, a community which includes the largest Middle Eastern population outside of the Middle East"); United States v. Koubriti, 252 F. Supp. 2d 418, 422 (E.D. Mich. 2003) (trial received "heightened level of media attention" and court received forty-seven requests for media credentials for the trial). Jury selection was allowed to continue despite the fact that United States forces had attacked Iraq. *See* David Shepardson, *Defense Lawyers Want Delay in Terror Trial Due to War*, DETROIT NEWS, March 21, 2003, at 1A.

13. United States Attorney General John Ashcroft, in violation of a court order barring public communications by parties and lawyers, referred to the case in two separate press briefings, one near the outset of the case in which he erroneously stated that the defendants arrested on September 17, 2001, were "suspected of having knowledge of the September 11th attacks," and on a second occasion when he stated that the testimony of the government's key witness had "been of value, substantial value." *See Koubriti*, 305 F. Supp. 2d at 725.

Since adverse publicity can taint a jury's evaluation of the evidence, courts have the authority to restrict extrajudicial statements by prosecutors and defense attorneys that have the potential to impair the integrity of the trial. *See* Patton v. Yount, 467 U.S. 1025, 1031 (1984) ("[A]dverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed."); Gentile v. State Bar of Nevada, 501 U.S. 1030, 1076 (1991) (upholding constitutionality of disciplinary rule barring attorney from making extrajudicial statements that have a "substantial likelihood of materially prejudicing" a trial).

entiously and fairly.[14] The jury's determination, then, appeared to be both intrinsically and extrinsically sound.

The jury did not know, however, that the evidence it received was defective. Indeed, in an extraordinary confession of error, the government acknowledged more than a year after the verdicts that the prosecution's evidence was mostly false, misleading, and incomplete and that the trial was riddled with prosecutorial misconduct.[15] As described below, the jury got it wrong, and the reasons for that outcome offer a stunning perspective on the vulnerability of an intrinsically competent jury when extrinsic factors have corrupted the integrity of the trial.

Part II of this Article describes the background and trial of the four defendants in the so-called Detroit "Sleeper Cell" terrorist prosecution. It examines the evidence relied on by the jury to reach its verdict, particularly the testimony of a key turncoat witness who accused the defendants of participation in a terrorist conspiracy. Part III examines how the jury's search for truth was corrupted by false, misleading, and incomplete proof. It identifies several extrinsic sources of jury error including suppressed evidence, dishonest and unreliable testimony, partisan experts, coaching, obstructed cross-examination, and inflammatory arguments. Finally, with the Detroit terrorist trial as the model, Part IV concludes that while the process of selecting juries is effective in reducing the incidence of intrinsic factors that might impair a jury's decision, even the most fair-minded and competent jury is always vulnerable to extrinsic factors that might infect its verdict. Indeed, the Detroit case illustrates that an intrinsically competent jury able to parse the evidence and apply the law fairly and accurately will almost always make the wrong decision when its verdict is based on extrinsically defective evidence that has been improperly presented.

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14. Commentators viewed the verdict as a sign that the jury system works. *See* Lisa Zagaroli, *Experts: Civil Rights Preserved; Jurors Showed They Could Fairly Examine Terrorism Case, Carefully Weigh Evidence*, DETROIT NEWS, June 4, 2003, at 1A (according to experts, "case demonstrates that the jury system can work, and that even fear of terrorism can be fairly examined in an open courtroom"). Given the high tensions and sensitivities, and in an effort to "lower the volume," the trial judge conducted a meticulous and extensive individual voir dire of each prospective juror. *See Koubriti*, 305 F. Supp. 2d at 728. Moreover, although the jury was not sequestered, it was chosen anonymously in order to protect the privacy of the jurors and the jury's ability to decide the case without external pressures. *See Koubriti*, 252 F. Supp. 2d at 420. The jury's verdict appears to have been carefully and conscientiously reached. The jury deliberated for seven days and returned a split verdict, convicting two defendants of the most serious terrorism-related charges, convicting a third defendant of the lesser count of document fraud, and acquitting the fourth defendant of all charges.

15. *See* Government's Consolidated Response Concurring in the Defendants' Motions for a New Trial and Government's Motion to Dismiss Count One Without Prejudice and Memorandum of Law in Support Thereof, United States v. Koubriti, No. 01-80778 (E.D. Mich. Aug. 31, 2004), at http://www.news.findlaw.com/hdocs/docs/terrorism/uskoubriti83104g.pdf [hereinafter Government Motion].

II. THE "SLEEPER CELL" TERRORIST CASE

A. *Unearthing a Purported Terrorist Conspiracy*

Six days after the September 11, 2001 attacks on the World Trade Center and the Pentagon, Karim Koubriti, Ahmed Hannan, and Farouk Ali-Haimoud were arrested in a Detroit apartment by a joint federal and state anti-terrorism task force. The agents were attempting to locate another individual, Nabil Al-Marabh, who was on the FBI's "watch list" of suspected terrorists. Inside the apartment the agents found false identity documents, audio tapes featuring fundamentalist Islamic teachings, a videotape depicting several United States tourist landmarks, and a notebook containing two sketches bearing the Arabic words "The American Air Base in Turkey under the Leadership of Defense Minister," and "Queen Alia, Jordan."[16] The defendants initially were charged with possessing false identification and immigration documents.[17] However, after a former roommate, Youseff Hmimssa, agreed to cooperate, the defendants were charged in a superseding indictment with conspiring to provide material support and resources to terrorism.[18]

The prosecution's case at trial was premised on the theory that the defendants operated a "sleeper cell" that was set up to provide covert, underground support for terrorist attacks inside and outside the United States. The prosecution alleged in its opening statement that the defendants were a "shadowy group" of Islamic fundamentalists connected to various international terrorist organizations who "stayed in the weeds" and were "planning, seeking direction, awaiting the call."[19] A key prosecution witness—FBI supervisory agent Paul George—testified as a "summary expert" that the defendants were an operational terrorist unit that was "going to strike out against targets, against the United States and abroad."[20] George based his conclusion on (1) his opinion that the sketches and videotape seized from the defendants' apartment constituted operational terrorist "casing mate-

16. *See id.* at 6. (describing the search of the apartment and denying the defendants' motion to suppress evidence seized pursuant to the search warrant).

17. *See* United States v. Koubriti, 199 F. Supp. 2d 656, 658 (E.D. Mich. 2002); 18 U.S.C. §§ 1028(a)(6), 1546(a) (2000).

18. *See* 18 U.S.C. §§ 371, 2339A (2000); *Koubriti*, 252 F. Supp. 2d at 419. Under the superseding indictment, a fourth defendant, Abdel Ilah El-Mardoudi, was also indicted as a co-conspirator. *Koubriti*, 252 F. Supp. at 419. "The first line of the government's indictment . . . appears to have been copied without attribution from a scholarly article on Islamic fundamentalism." Danny Hakim & Eric Lichtblau, *After Convictions, the Undoing of a U.S. Terror Prosecution*, NEW YORK TIMES, Oct. 7, 2004, at A1.

19. *See* Government Motion, *supra* note 15, at 10-11. The superseding indictment under which the defendants were tried alleged that the defendants "operated as a covert underground support unit for terrorist attacks within and outside the United States, as well as a 'sleeper' operational combat cell." *Id.* at 11 (citation omitted). Assistant United States Attorney Richard Convertino was the lead prosecutor at the trial.

20. *Id.* at 11 (citing 25 Tr. 4653).

rial" used for surveillance for planned terrorist attacks; (2) the defendants' acquisition of fraudulent identity documents and their involvement in other fraudulent activities; and (3) the testimony of Hmimssa.[21]

B. *Alleged "Casing" Sketches and "Surveillance" Videotape*

The sketches and videotape were critical to George's opinion. In the absence of direct proof regarding the origin, purpose, or intended use of the sketches, the prosecution relied on the testimony of George. He asserted that possession of these materials "clearly showed this [apartment was] a repository of intelligence" containing "operational terrorist material."[22] His opinion that the Jordan and Turkey drawings constituted "casing material" was based on three considerations. First, the drawings "looked like [they] depicted something that could exist"; second, the sketches were in fact "consistent with a place in the real world"; and third, the sketch locations were "possible [terror] targets."[23]

1. Jordan "Hospital" Sketch

According to George, the sketch bearing the label "Queen Alia, Jordan" was a "casing sketch" because "it ha[d] all the markings one would need and ha[d] a location."[24] In reaching this conclusion, George relied on the testimony of two other witnesses—FBI agent Michael Thomas and State Department employee Ray Smith. Thomas testified that he traveled to Jordan, that he showed the sketch to members of the Jordanian Intelligence Service, and that they be-

21. *Id.* (citing 25 Tr. 4635). George characterized the defendants' acquisition of fraudulent documents and involvement in fraudulent activities as "economic Jihad." *Id.* (quoting 25 Tr. 4635). George opined that possession of fraudulent documents was consistent with "the purpose of bringing in other members." *Id.* at 11-12. He further testified that the defendants' attempts to obtain driver's licenses were "consistent with the transportation needs of a terrorist cell," and attempts to obtain hazardous material specifications were "consistent with a list of things a terror cell seeks to establish." *Id.* at 12.

22. *Id* at 11 (quoting 25 Tr. 4635). George further explained that examination of this "casing material" shows that "this is an intelligence group, an intelligence cell whose purpose is to maintain potential targets, to maintain intelligence casing material." *Id.* (quoting 25 Tr. 4630). George claimed that international wire transfers as evidenced in this case are "the hallmark of an international terrorist organization," and that the ability of the defendants through credit card schemes "to connect two people who can communicate freely on the telephone or in code as it is called for by in some of the terrorist manuals is remarkable." *Id.* at 12 (quoting 25 Tr. 4632).

23. *Id.* at 15-16 (quoting 25 Tr. 4538-39). George reached his opinion that the sketches were operational terrorist casing sketches based entirely on his three-part formula without reference to any other evidence. *Id.* at 15 (citing 26 Tr. 4697). George testified that although the drawings might look crude, "it is imperative to keep things simple because any unnecessary marks confuse the mind with too much detail." *Id.* (quoting 25 Tr. 4539). The sketches, he further observed, "were examples of a situation where minimal details are recorded on an as-needed basis because everything the operator does is in preparation for the possibility of arrest." *Id.* (quoting 25 Tr. 4535).

24. *Id.* at 16 (quoting 25 Tr. 4540).

lieved the sketch was of the Queen Alia Military Hospital.[25] Thomas testified that he went to the hospital, and he identified for the jury several objects in the sketch that he claimed corresponded to what he saw, including a "very large dead tree."[26] According to George, the presence of the dead tree provided "certainty" that the sketch was a casing drawing.[27] The prosecution did not introduce any photographs to reinforce Thomas' testimony.

"Smith testified that he had traveled with Thomas and two Jordanian agents to the . . . Queen Alia Military Hospital," and that the Jordan sketch accurately represented the hospital, most convincingly because of the "'prominent' dead tree standing by the side of the road."[28] Smith also had an opportunity to do an overhead flight over the location. He testified that there was "no doubt in my mind I had sufficient information to believe that this sketch was similar to the Queen Alia Military Hospital, by just doing the on-the-ground work. But doing the fly-over reinforced that a great deal."[29] Smith further testified that based on his experience "as a security officer, if I were to see this sketch and I worked at that hospital, I'd be very concerned [that] this was part of some bigger plan."[30] No photographs were taken of the site, Smith emphasized, because "diplomats serving overseas . . . never take picture[s] of a military installation."[31]

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25. *Id.* (citing 8 Tr. 1131-35). Thomas testified that officials in the Jordanian Intelligence Service noted that there are three locations in Jordan that bear the designation "Queen Alia" in their name—the Queen Alia Airport, the Queen Alia Hotel and the Queen Alia Military Hospital. *Id.* (citing 8 Tr. 1131-35).

26. *Id.* at 17 (quoting 8 Tr. 1131-34). At the request of the court, Thomas described in "step-by-step detail" the route he traveled to reach the hospital and what he did and saw. He testified there was "a large, dead tree with no leaves, only branches, and also identified a 'very sharp turn' that was 'exactly consistent'" with the way it was drawn on the sketch. *Id.* (quoting 8 Tr. 1138).

27. *Id.* at 20. (citing 11 Tr. 4540-41). According to Thomas, he was "certain" that the drawing was a casing sketch because "it ha[d] a clearly defined set of markings" that "tells me that when I get there, I'm in the right place." *Id.* (quoting 11 Tr. 4540-41). If one puts oneself "in the shoes of the [terrorist] operator . . . you need certainty. That mark there is that certainty." *Id.* (quoting 11 Tr. 4540-41). Indeed, according to Thomas, "a tree does better than does North, South, any other thing, any other description." *Id.* (quoting 11 Tr. 4540-11).

28. *Id.* at 18 (quoting 11 Tr. 1770-87). Smith noted that the group first traveled to the Queen Alia Airport and Queen Alia Hotel but the group "quickly concluded that those locations did not match the sketch." *Id.* (quoting 11 Tr. 1770-87).

29. *Id.* at 19 (quoting 11 Tr. 1787). Smith was extremely confident of his conclusion, testifying that as he gave the hospital area a closer inspection, "every time we turned, it was getting more and more like this drawing." *Id.* (quoting 11 Tr. 1780).

30. *Id.* (quoting 11 Tr. 1783-84).

31. *Id.* at 19-20 (quoting 11 Tr. 1785-86). In response to questions from the court and the defense, the prosecutor stated that he did not intend to introduce any photographs of the hospital site. *Id.* at 18. Smith was specifically asked by the prosecutor, and the defense on cross-examination, whether he took photographs of the hospital site. *Id.* at 20 (citing 11 Tr. 1797-1811). He maintained that "he did not believe he could have obtained photographs." *Id.* (quoting 11 Tr. 1797-1811). "Neither Smith nor Thomas mentioned that [the trial prosecutor] had also traveled to Jordan and accompanied them on their site visits." *Id.* at 18 n.7 (citing 8 Tr. 1132, 11 Tr. 1771).

2. "Turkish Air Base" Sketch

The prosecution sought to prove that the second sketch, labeled "American Base in Turkey Under Command of Secretary of Defense for All Weapons," was a "casing sketch" of the Incirlik Air Base in Turkey.[32] Asked to explain the importance of this sketch, FBI Agent George testified that "[i]t gives all the information one would need to conduct a terrorist attack."[33] George's conclusion was based on the testimony of FBI Agent Thomas as well as Air Force Colonel Mary Peterson. Thomas testified that he met with Turkish intelligence officials and United States Special Investigation Air Force officers; they viewed the Incirlik base from the vantage point from which they believed the sketch had been drawn. He testified that "what he observed was 'almost identical' to the drawing."[34]

Colonel Peterson testified that although "there were 'important differences' between the actual base and the drawing,"[35] "it was apparent to [him] upon seeing it, that [the sketch depicted] air field operations."[36] The sketch was a "starting or preoperational surveillance" of the air base.[37] Unlike the alleged hospital sketch, to support Peterson's opinion the prosecution introduced into evidence photographs of the airbase, the air shelter, and planes flying over the base.[38]

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32. *Id.* at 25-26 (quoting 7 Tr. 1016-17). The prosecutor in his opening statement told the jury that it would hear testimony that the sketch was a "casing picture of the United States base in Incirlik, Turkey, the airbase that does Northern Watch over Iraq." *Id.* at 26 (quoting 7 Tr. 1016-17). The prosecutor further asserted that a military colonel assigned to the base would testify to "where that sketch was drawn from," that the sketch "depicted on the page, are the very flight pattern as the planes take off every single time at Incirlik" and will identify at the bottom of the page a "harden bunker." *Id.* at 26 (quoting 7 Tr. 1016-17).

33. *Id.* (quoting 25 Tr. 4540). George elaborated that the sketch "may look crude, but the hallmark of an operational plan, whether it's a casing sketch or it's how the plan is carried out, is simplicity." *Id.* (quoting 25 Tr. 4539).

34. *Id.* at 27 (quoting 8 Tr. 1143-44). Thomas testified that he observed "a runway down the center of the air base and AWACs, tankers and fighter jets lined on the tarmac in a format that resembled the drawing." *Id.* (quoting 8 Tr. 1150). He also observed a "hardened aircraft shelter . . . that he said resembled the object drawn on the lower left side of the sketch." *Id.* (quoting 8 Tr. 1145-46). Thomas further testified that three circular objects on the drawing resembled "three circular looking antennas." *Id.* (quoting 8 Tr. 1147-48).

35. *Id.* at 28 n.13 (quoting 13 Tr. 2225-27). "She described the sketch as not a 'single drawing, but a series of depictions.'" *Id.* (quoting 13 Tr. 2225-27).

36. *Id.* at 27 (quoting 13 Tr. 2225). She testified that the drawing "apparently depicted AWACs, refueling airplanes and fighters," and that these planes, all of which were involved in Operation Northern Watch, "were shown in the actual takeoff sequence, and that the drawing in the lower left-hand portion resembled a hardened air shelter." *Id.* at 26-27 (quoting 8 Tr. 1141).

37. *Id.* at 28 (quoting 13 Tr. 2243). She also offered her strong belief that slash marks on the drawing "could be field of fire from shoulder launched missiles." *Id.* (quoting 13 Tr. 2245-46).

38. *Id.* (citing 11 Tr. 2228-32, 2239-41). The prosecution sought to bolster Peterson's testimony by eliciting from her that she showed the drawing to several officials who were more familiar with the base than she was, including the Security Police Commander, all of whom concurred in her assessment. *Id.* at 29. "Peterson also testified that senior officers with oversight flight [responsibilities] at the [Incirlik base] modified flight arrival and departure protocols after viewing the drawing." *Id.* at 29 n.15 (quoting 13 Tr. 2243-44).

3. "Surveillance" Videotape

In addition to the sketches, the government sought to prove that a videotape in Arabic found in the defendants' apartment was a terrorist "casing" video. The video showed shots of the MGM Grand Hotel in Las Vegas, Disneyland, as well as various sites in New York. George offered his "very strong opinion" that the videotape constituted "operational terrorist material."[39] After describing a Disneyland sequence that showed the underground line to the Raiders of the Lost Ark ride, George testified that the tape contained "all the information . . . that is needed to conduct a terrorist attack at that line."[40] A government translator also testified that language on the tape contained a direct threat and derogatory remarks about the United States.[41]

C. *Testimony of Turncoat Witness Youseff Hmimssa*

Youseff Hmimssa was the only witness for the prosecution who claimed to have direct knowledge that the defendants were involved in terrorist activities.[42] Hmimssa, a Moroccan native, was a fugitive when he met the defendants and moved in with them.[43] He testified that the defendants were Islamic fundamentalists who lauded ter-

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39. *Id.* at 38 (quoting 25 Tr. 4629). "The tape, which originally contained a commercial movie . . . had been recorded over with various material, including TV news, a cartoon, a Lebanese singer, as well as scenes from the trip." *Id.* at 37 (quoting 8 Tr. 1121).

40. *Id.* at 38 (quoting 25 Tr. 4593). George noted the existence of a garbage can at the end of the line. "[He] testified that the garbage can was an 'ideal location' for a bomb, and claimed that after this sequence a voice said 'this is a grave yard.'" *Id.* (quoting 25 Tr. 4593, 4589).

41. *Id.* (citing 31 Tr. 5773-74). "The defendants argued that the videotape was simply a tourist tape depicting . . . young *Tunisians* visiting notable [U.S.] attractions." *Id.* The defense also claimed that the language on the tape contained a mix of Classical Arabic and Tunisian dialect, and that "the government translators mistranslated critical portions of the videotape because they had difficulty understanding Tunisian, or any of the closely related North African dialects . . . ." *Id.* (quoting Tr. 5754). The government expert testified that he had no difficulty deciphering the tape, understanding it, and writing it down. *Id.* at 39 n.23 (citing 31 Tr. 5769). The prosecutor attempted to bolster the government's translation and discredit the opinion of the defense translator by asking her "whether it would change her opinion to learn that six other translators had independently reviewed the portion of the tape in question and had agreed with the government's translation." *Id.* at 38-39 (quoting 31 Tr. 5757-58). The prosecutor also attempted to discredit the defense claim by suggesting that "there is little or no difference between Classical Arabic and the Tunisian dialect," and that any differences resemble "regional or state-by-state differences in the English language . . . ." *Id.* at 39 (quoting 31 Tr. 5779-80).

42. *Id.* at 42. Another witness, James Sanders, gave far more limited testimony. *Id.* at 42 n.25.

43. *Id.* at 42-43. Hmimssa was originally indicted on September 27, 2001, along with defendants Koubriti and Hannan, charged with document fraud and misuse of visas. United States v. Koubriti, 199 F. Supp. 2d 656, 658 (E.D. Mich. 2002). On March 22, 2002, the court granted his motion for a severance. *See Koubriti*, 199 F. Supp. 2d at 658 n.1. Hmimssa "entered the U.S. illegally in 1994" and acquired computer skills "to execute a large scale credit card fraud." Government Motion, *supra* note 15, at 42. He was eventually "arrested by the Secret Service, agreed to cooperate, and then fled to Detroit where he met and moved in with defendants Koubriti and Hannan." *Id.*

rorists and engaged in various terrorist-related activities.[44] According to Hmimssa, the defendants

> conducted surveillance of potential terrorist targets in Detroit, attended mysterious meetings with unknown persons, . . . discussed various terrorist plots such as poisoning food on airplanes and shooting down commercial airplanes with Stinger missiles[,] . . . established methods to communicate internationally [without being traced,] attempted to obtain false identifications, money, and weapons to assist 'brothers' overseas, . . . conducted wire transfers with extremist brothers overseas[,] . . . and threatened to kill Hmimssa if he [turned out] to be an informant . . . .[45]

"Throughout his testimony, Hmimssa portrayed himself as secular, loyal to the United States," and entirely truthful.[46]

D. *"Corroborating" Evidence*

The prosecution offered allegedly corroborating evidence to establish that the defendants engaged in conduct that was consistent with terrorist activities.[47] For example, the prosecution introduced approximately 105 audio tape recordings seized from the Detroit apartment, which, according to government experts, contained fundamentalist Islamic teachings.[48] In addition, the government introduced evidence that defendant Hannan, in a post-arrest statement to the FBI, acknowledged that he knew that certain documents found in the Detroit apartment were false.[49]

The prosecution also introduced evidence intended to rebut a principal contention by the defense, namely, that the sketches and no-

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44. *Id.* at 43 (citing 15 Tr. 2476-94, 2497-510; 16 Tr. 2567-73, 2577-85). Hmimssa testified that the defendants "praised terrorists such as Sheik Omar Rahman and Osama Bin Laden, and criticized pro-U.S. Arab leaders in Saudi Arabia and Jordan." *Id.* (quoting 15 Tr. 2476-94, 2497-510; 16 Tr. 2567-73, 2577-85).

45. *Id.* (quoting 15 Tr. 2469-75; 16 Tr. 2566-67; 15 Tr. 2517-19; 16 Tr. 2573-77; 15 Tr. 2519-23; 16 Tr. 2555-58; 15 Tr. 2494-2500 5616-17; 16 Tr. 2546-50, 2557-58, 2561-64; 16 Tr. 2558-61.).

46. *Id.* at 43-44. "Hmimssa was cross-examined for three days." *Id.* at 43. The questioning probed his extensive career as a criminal, "his incentive to assist the government," and his failure to allege in earlier government debriefings "that the defendants were terrorists." *Id.*

47. *Id.* at 50. As part of his tradecraft analysis, Agent George was asked to give his expert opinion on the significance of this alleged corroborating evidence. *Id.* at 50 n.32.

48. *Id.* at 50. Given the shortage of government Arabic language specialists, the prosecution employed a cooperating witness, Marwan Farhat, to translate the tapes. *Id.* Farhat had a "history of violence and drug related criminal convictions" and was involved with individuals associated with the terrorist group Hizballah. *Id.* Farhat was awaiting trial on federal cocaine charges. *Id.* at 51-52. "In return for his work, Farhat was paid by the FBI and . . . received an unusually large sentence reduction" upon the recommendation of the trial prosecutor. *Id.* at 51. The prosecution's employment of Farhat was not disclosed to the defense. *Id.* Farhat's identity was leaked to the media on January 17, 2004, and he fled the country within five days. United States v. Koubriti, 307 F. Supp. 2d 891, 894 (E.D. Mich. 2004). The court criticized the disclosures of confidential information to the media. *Id.* at 894-95. The problem of making accurate translations of Arabic tapes still persists and has not been effectively remedied. Eric Lichtblau, *F.B.I. Said to Lag on Translations of Terror Tapes*, N.Y. TIMES, Sept. 28, 2004, at A1.

49. *See* Government Motion, *supra* note 15, at 52. The government's memorandum suggests that this incriminating passage may have been added to the FBI report at the request of the trial prosecutor. The FBI's original interview notes of the interrogation of Hannan "do not reflect Hannan's admission." *Id.*

tations were doodles made by Ali Ahmed, "a mentally unstable Yemeni man" who had previously occupied the Detroit apartment.[50] The defense argued that Ali Ahmed "had delusions [of] being a General in the Yemeni Army[,]" had drawn the sketches, and had left them in the apartment where they were found by the defendants.[51] "The prosecution [argued] that the defendants used Ali Ahmed as a dupe to provide 'cover' for their terrorist" operations and induced him to pretend that the sketches were his.[52] Although no witnesses "recalled [ever] seeing Ali Ahmed in the company of the defendants,"[53] the prosecution called a witness, Carolyn Fuhr Sadowski, a Sam's Club employee, who identified defendant Koubriti as having accompanied Ali Ahmed to Sam's Club in January 2001 when the two purchased over three thousand dollars' worth of cigarettes using a bad check.[54] The defense contended that Sadowski was mistaken, and that the person accompanying Ali Ahmed was Thamir Zaia, whose driver's license had been presented by the two as identification.[55] Apparently, Sadowski was a convincing witness, for as the trial judge observed, "[She was] certain. She didn't hesitate, she looked at everybody and she picked out Mr. Koubriti."[56]

E. *Prosecutor's Portrayal of the Evidence*

Both in his opening statement and his summation, the prosecutor portrayed the defendants as a "sleeper operational combat cell" waiting for the opportune moment to attack targets both within and outside the United States. The prosecutor's opening remarks, for example, claimed that the defendants were a "'shadowy group' that 'stayed in the weeds' [and were] 'planning, seeking direction, awaiting the call.'"[57] The prosecutor's closing argument tracked the same

50. *Id.* at 53.

51. *Id.*

52. *Id.* The prosecution also introduced testimony from the landlord's son that everything in the apartment had been discarded prior to the defendants' rental. *Id.* at 53 n.33.

53. *Id.* at 53. "Ali Ahmed committed suicide in March 2001" before Koubriti and Hannan moved into the apartment. *Id.*

54. *Id.* Sadowski identified Koubriti from photographs as the man who accompanied Ahmed at Sam's Club. *Id.* at 54. "Although Koubriti was working [on] a chicken farm in Ohio in January 2001," the prosecution proved "that he was not at work on the date in question." *Id.*

55. *Id.* at 53-54. Zaia had a prior conviction for smuggling cigarettes and apparently acknowledged several times to government agents that he was with Ahmed at Sam's Club on the date in question. *Id.* at 54. On advice of counsel, Zaia refused to testify. *Id.*

56. *Id.* (quoting 21 Tr. 3927). As the government's memorandum suggests, events since the trial indicate that it was indeed Zaia who was with Ahmed. *See id.* at 54-55. Although Zaia "gave a handwriting sample that closely matched the writing on the bad check, he failed a polygraph examination [when he was] asked whether he was with Ali Ahmed and whether Koubriti was not present." *Id.* at 55. Moreover, a former CIA official, William McNair, challenged the prosecution's theory that the defendants had used Ali Ahmed as a decoy as "inconsistent with conventional tradecraft analysis." *Id.* at 55-56. This information was not disclosed to the defense. *Id.* at 56.

57. *Id.* at 10-11 (quoting 8 Tr. 1023-24 (opening statements)).

theme in more detail, arguing that the defendants were a "dangerous, . . . pre-operational cell" that probably would have been successful had they not been intercepted by law enforcement.[58] The prosecutor reminded the jury that the "cell . . . was stopped[, the] cell . . . was caught[, the] cell . . . cannot operate"; the prosecutor urged that "these people belong in prison," adding, "[d]on't give these people another chance to make their plan effective."[59] Reinforcing the potentially catastrophic consequences of the defendant's terrorist activities, the prosecutor argued:

> You know the defense is represented by those attorneys. We represent people too. The mother and father in the ride in the Disneyworld underground. The soldier in Incirlik, Turkey, who takes a plane off, sitting on $500,000 worth of—500,000 gallons worth of fuel. The people in Amman, Jordan from the United States Embassy who go to that hospital. The people in Las Vegas in the lobbies of hotels. The person driving his car down Pacific Coast Highway or the person walking into the New York Times Building, thinking it's just another day. People here in Dearborn, Michigan and all parts of Michigan, people who think they're safe, who don't think about anything other than getting home to their families. Those are the people we represent as well.[60]

III. How the Jury's Search for Truth Was Corrupted

The jury deliberated for seven days and returned a split verdict. It found defendants Koubriti and El Mardoudi guilty of conspiring to provide material support and resources to terrorism. It acquitted defendant Hannan of these charges, but found him guilty of document fraud conspiracy. It found defendant Ali-Haimoud not guilty of all charges.[61]

The defendants moved to set aside the verdict and for a new trial, alleging a "pervasive pattern of outrageous misconduct [that] deprived them of a fair trial and violated the very integrity of the judicial system."[62] The defendants made specific allegations that the Government knowingly used false testimony, suppressed critical evidence, interfered with access to witnesses, and improperly vouched for and bolstered the testimony of witnesses.[63] The trial judge held a hearing

58. *Id.* at 57 (quoting closing argument).
59. *Id.* (quoting closing argument Tr. 71-72).
60. *Id.* at 57-58 (quoting Tr. 71-72).
61. *Id.* at 1-2.
62. Motion for Judgment in Favor of the Defendants Notwithstanding the Verdict or, in the Alternative, For a New Trial, With Request for an Evidentiary Hearing, United States v. Koubriti et al., No. 01-80778 (E.D. Mich. Oct. 17, 2003), at 2 (on file with author) [hereinafter Defendants' Motion].
63. *Id.* Before the trial began, "the government deported at least two witnesses who challenged the prosecution's case." Norman Sinclair, Ronald J. Hansen, & David Shepardson, *Fed Missteps Jeopardize Terror Case; Federal Review Finds Government Ignored Own Rules, Withheld More Than 100 Documents from Defense*, Detroit News, March 28, 2004, at 1A.

on the motion on December 12, 2003. During that hearing the judge discovered that the prosecution had possessed two documents that "clearly" contained exculpatory and impeachment material, and there was "no question" that the documents should have been disclosed to the defense.[64] The court reserved decision on the defendants' motion, and ordered the Government to conduct a thorough review of every document in the case to determine whether there were additional documents that should have been disclosed.

Following a nine-month review, the Government filed a memorandum dated August 31, 2004, conceding that the convictions were flawed and describing in considerable detail how the jury's determination was impaired by the misconduct of the prosecution.[65] According to the Government's memorandum,

> In its best light, the record would show that the prosecution committed a pattern of mistakes and oversights that deprived the defendants of discoverable evidence (including impeachment material) and created a record filled with misleading inferences that such material did not exist. Accordingly, the government believes that it should not prolong the resolution of this matter pursuing hearings it has no reasonable prospect of winning.[66]

The Government requested that the defendants be given a new trial on the charges dealing with document fraud, and that the count charging them with conspiracy to engage in terrorist activities be dismissed. The judge granted the Government's motion.[67]

As described below, the Government's memorandum offers an extraordinary insight into how a jury can reach the wrong result not from any defects intrinsic to the jury's decision-making competence but for extrinsic reasons that relate to the nature of the evidence and the manner in which it is presented. The Government's memorandum described in meticulous detail how the jury received false, misleading, incomplete, and prejudicial information, including the prosecution's suppression of exculpatory and impeachment evidence, allowing wit-

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64. *See* Government Motion, *supra* note 15, at 44-45 (citing 121203 TR 167). One of these documents was a letter from Milton "Butch" Jones regarding jail house communications with Youseff Hmimssa. *See id.* at 44; *see also infra* notes 113-115 and accompanying text.

65. *See* Government Motion, *supra* note 15.

66. *Id.* at 5. From the beginning, even accepting the reliability of the proof, senior officials in the Justice Department expressed serious doubts about the strength of the case. *See* Danny Hakim & Eric Lichtblau, *After Convictions, the Undoing of a U.S. Terror Prosecution*, N.Y. TIMES, Oct. 7, 2004, at A1 (stating that officials had described the case's "chance of success" as a "close call," and the evidence as "somewhat weak").

67. *See* United States v. Koubriti, 336 F. Supp. 2d 676, 682 (E.D. Mich. 2004).

> As the Government's filing also makes clear, these failures by the prosecution were not sporadic or isolated. Rather, they were of such a magnitude, and were so prevalent and pervasive as to constitute a pattern of conduct, that when all of the withheld evidence is viewed collectively, it is an inescapable conclusion that the Defendants' due process, confrontation and fair trial rights were violated and that the jury's verdict was infected to the point that the Court believes there is at least a reasonable probability that the jury's verdict would have been different had constitutional standards been met.

Id. at 681.

nesses to give false and misleading, and unreliable, testimony, misusing experts, coaching witnesses, obstructing cross-examination, and making inflammatory arguments to the jury.

A. *Suppression of Evidence*

One of the techniques employed by prosecutors to obstruct accurate fact-finding is to conceal exculpatory evidence from the jury that has the potential to materially affect the fact-finding process and the suppression of which seriously impedes the jury's search for the truth.[68] Indeed, the prosecutor's suppression of evidence that would be materially favorable to the defense is one of the major causes of erroneous convictions.[69] Given his superior investigative resources and early access to evidence of criminal wrongdoing, a prosecutor has a unique ability to acquire evidence that may contradict the prosecutor's theory of the case. To the extent a prosecutor has exclusive knowledge and control of such evidence, the prosecutor has a constitutional and ethical duty to disclose such information to the defense.[70] By failing to disclose potentially truth-enhancing evidence as well as obstructing defense access to potentially truth-enhancing evidence, a prosecutor violates his constitutional and ethical duty and impedes the jury's ability to find the truth.[71]

As the Government's memorandum acknowledged, the prosecutor concealed from the court, the defense, and the jury evidence that would have altered the jury's evaluation of the case, the suppression of which arguably produced an erroneous decision. The suppressed evidence probably would have altered the jury's conclusion that the sketches and the videotape were prepared by the defendants to further a terrorist plot.

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68. *See* BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT §§ 5:1-5:24 (2d ed. 2003).

69. *See* Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 23, 57 (1987) (asserting that fifty of the 350 wrongful convictions resulted from prosecutorial suppression of exculpatory evidence or other overzealous prosecution); Marty Rosenbaum, *Inevitable Error: Wrongful New York State Homicide Convictions, 1965-1988*, 18 N.Y.U. REV. L. & SOC. CHANGE 807, 809 (1991) ("[A] substantial number of the wrongful convictions we have found in New York resulted from prosecutorial misconduct."); Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at C1 (claiming 381 homicide cases were reversed because prosecutors concealed evidence suggesting defendants' innocence or presented evidence known to be false).

70. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) ("[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.").

71. The search for truth is generally regarded as the touchstone for the adversary system. *See* Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) ("[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence."); Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1372 (1991) ("The theme of accurate adjudication lies at the very heart of the Burger and Rehnquist Courts' vision of constitutional criminal procedure."); Thomas L. Steffen, *Truth as Second Fiddle: Reevaluating the Place of Truth in the Adversarial Trial Ensemble*, 4 UTAH L. REV. 799, 804 (1988) ("Simply stated, truth is the sine qua non of justice. If justice is to have meaning beyond that of a hollow shibboleth, it must reflect a wise and fair application of truth.").

1. Jordan "Hospital" Sketch

Undisclosed evidence suggests that the Jordan sketch, which, according to several Government witnesses depicted the Queen Alia Hospital,[72] did not in fact represent the hospital. The prosecution's insistence notwithstanding, the Government's memorandum stated: "It is difficult if not impossible to compare the day planner sketches with the photos and see a correlation between the drawings and the hospital site."[73] Undisclosed e-mails and photographs from the State Department indicate that the testimony of prosecution witness Ray Smith, the State Department employee who claimed that the sketch positively matched the hospital and that it was not possible to take photographs, was untruthful.[74] Contrary to the testimony of Government witnesses, photographs of the hospital not only could have been taken, but were in fact taken at the prosecution's request.[75] The Government's memorandum stated that the suppression of this evidence "misled" the jury by creating the "false impression" first, that there was consensus that the drawing depicted the hospital,[76] and second, that "photos could not be taken due to diplomatic red tape."[77]

Additional undisclosed evidence would have proved that after Smith's trip to Jordan, he advised his superiors that he visited both the hospital and the airport, and that after looking at the sketch, he could not establish what the sketch referred to.[78] Indeed, a draft prosecution memorandum prepared after Smith's Jordan trip referred to the sketch as depicting not the hospital but the airport.[79]

Moreover, the prosecution concealed from the jury that the Jordanians initially believed that the sketch depicted the Queen Alia Airport and not the hospital and misled the jury into believing that the Jordanians focused on the hospital from the start.[80] According to

72. *See supra* notes 25-31 and accompanying text.

73. *See* Government Motion, *supra* note 15, at 23.

74. *Id.* at 22-23. These e-mails show (1) after visiting the hospital and the airport, Smith "could not establish which site (if either) the sketch referred to," (2) there was "no problem obtaining permission to take aerial photographs," and (3) despite repeated requests, none of the persons who were assigned to take photos of the hospital site could locate the "large dead tree." *Id.* at 21, 22 n.9, 21-22. Agent George reinforced Smith's claim, emphasizing in his testimony that "photographs could not be taken." *Id.* at 23 (quoting 26 Tr. 4843).

75. *Id.* at 20-22. E-mails state that "at AUSA Convertino's request, he had obtained and given to SA Thomas a series of aerial and ground photos of the Queen Alia Hospital." *Id.* at 21. George's testimony reinforced Smith's assertion that diplomatic red tape prevented him from taking photographs of the hospital. *Id.* at 23. In his testimony, George stated, "I leave that discretion entirely to him. So if he tells me he felt that taking photographs would, in any way, impact on his ability to do his primary mission, sir, I leave that entirely to him." *Id.* (quoting 26 Tr. 4662).

76. *Id.* at 22-23.

77. *Id.* at 23.

78. *Id.* at 21.

79. *Id.* at 21 n.8.

80. *Id.* at 24 n.11. Thomas stated to the Public Integrity investigators during the post-trial inquiry "that the Jordanians initially believed that the sketch was of the Queen Alia Airport and not the hospital," but Thomas did not reveal this to the jury during his testimony. *Id.*

Thomas' testimony: "We presented [the sketch] to the Jordanians. They said we believe this is the military hospital." Smith sidestepped the question, asked on direct examination, as to why he went to the airport first by responding that "'one of the reasons' they went [to the airport] was because it had 'Queen Alia' in its name." He failed to answer why they visited the airport first.[81] Smith again gave a misleading answer "when asked on cross-examination whether the airport was the Jordanians first [opinion] upon looking at the sketch," suggesting again that the only reason they went to the airport was because it had the name "Queen Alia."[82]

Further, several undisclosed e-mails contained a series of aerial photographs of the hospital and the road networks leading to the hospital. Although the State Department requested photographs of the hospital, particularly of the "large dead tree," which was urged by the prosecution to constitute such a prominent landmark, neither Smith nor his associates could locate the tree.[83] Following the prosecutor's request that additional photographs be taken to locate the tree, a new set of photographs was taken of the hospital with more specific directions as to where the tree might be located. All of the photographs were forwarded to the prosecutor. Nevertheless, through the testimony of Smith and FBI Agent George, the jury was informed that "photographs could not be taken."[84] Finally, the above sets of photos mysteriously "disappeared" after the trial.[85]

2. "Turkish Air Base" Sketch

Undisclosed evidence also contradicts the prosecution's contention that the sketch labeled "American Base in Turkey Under Commands of Secretary of Defense for All Weapons" was a "casing sketch" of the Incirlik Air Base in Turkey. The prosecution witnesses conveyed the impression, shown to be false, that government officials were unanimous.[86] An undisclosed internal report by an Air Force investigator alleged that the Government's assertion at trial that the hardened air shelter (HAS) at the base was "almost identical" to the drawing, and that the dark parallel lines and human-like figures on the

81. *Id.*
82. *Id.* (quoting 11 Tr. 1805).
83. *Id.* at 21-22.
84. *Id.* at 23 (quoting 26 Tr. 4843).
85. *Id.* at 25 n.12. Although Thomas was given two different sets of photos of the hospital site, Thomas "failed to enter the photos into the FBI's . . . files." *Id.* "Thomas claimed he planned to enter the photos into the FBI evidence file digitally," but was never given the appropriate disk. *Id.* Thomas claimed he last saw the photos in the "trial preparation room" and speculated that a paralegal "may have thrown them away after trial." *Id.* As the government's memorandum states, "The disappearance of these photos that the prosecution team sought so diligently to acquire would be difficult for the government to explain at a new trial hearing." *Id.*
86. *See supra* notes 32-38 and accompanying text. According to the Government's memorandum, this impression was "inaccurate." Government Motion, *supra* note 15, at 33.

sketch that allegedly represent fields of fire, were "highly speculative."[87] The Air Force report asserted that these speculative portions of the sketch were "sold" to the prosecution as facts. The Air Force report also asserted that the prosecutor "believe[d] strongly in the HAS theory and want[ed] someone from [the Air Force] to testify that the drawing [was] in fact a HAS."[88]

Moreover, after closely examining the Turkey sketch, Air Force investigators had formed an alternative theory that the figure on the lower left portion of the drawing was a map of the Middle East.[89] Colonel Peterson, the Government's principal witness that the sketch depicted the air base, did not disclose that others within the Air Force disagreed with her testimony,[90] nor did she reveal that she was aware of the alternative "Middle East map" theory.[91] The map theory had been relayed to the prosecutor, along with an innocent explanation of how it may have been created. The prosecutor replied "adamantly, '[i]t's not a map of the Middle East.'"[92]

The prosecutor also suppressed evidence that intelligence officials did not believe the sketches were connected to terrorist activities. After viewing the sketch, high-level intelligence officials employed by the Turkish National Police concluded "that the sketch did not look like any terrorist sketch they had [ever] seen in the past."[93] In addition, William McNair, a former Information Review Officer for the Director of Operations at the Central Intelligence Agency, had given the prosecutor prior to trial a "similarly negative [opinion] of the Turk[ish] air base sketch," suggesting that it was "what one would expect from someone who was not very well-trained."[94] Moreover, after soliciting the opinions of various individuals in the CIA's counter-terrorism and paramilitary center, McNair indicated that none of these officials believed that the sketch was "indicative of any particular

87. Government Motion, *supra* note 15, at 28 n.13, 29. The report, prepared by Special Agent Goodnight, provided a detailed summary of his reasons for concluding that the sketch did not depict the Turkish air base, particularly the location and description of the air shelter. *Id.* at 31. Goodnight specifically warned the prosecutor not to hang his hat on the theory that the sketch depicted the Turkish air base. *Id.*

88. *Id.* at 30 (quoting ¶ 15 of Internal Addendum to March 26, 2003 Air Force OSI Report).

89. *Id.*

90. *Id.* at 33. "Neither Peterson nor the prosecution advised either the defense or the Court of the Air Force's alternative theories." *Id.* at 32 n.18.

91. *Id.* at 32 n.18 ("Peterson has since admitted to the Public Integrity investigators that she had seen the document (enlargement by Air Force officials of the lower left drawing) prior to trial but did not associate that with the defense's question of whether she had ever seen a blowup.").

92. *Id.* at 33 ("Although Goodnight knew that the Air Force had developed a Middle East map theory, Goodnight knew from Convertino's tone that the topic was not up for discussion and there was no further discussion of the topic.").

93. *Id.* at 34-35. Although it is clear that the opinion of the Turkish intelligence officials was conveyed to the prosecution, this information was not disclosed to the defense and investigators did not find a copy of the report in the FBI's files. *Id.* at 34 n.20.

94. *Id.* at 35.

group or country" or "conveyed any useful information."[95] According to McNair, the prosecutor "didn't much care what I was saying."[96] It was McNair's belief that the prosecutor "was shopping for an opinion consistent with his own."[97]

3. "Surveillance" Videotape

The prosecutor also suppressed evidence that would have undermined his asserted position that the videotape was "operational terrorist material." The prosecutor claimed that the videotape's depiction of sites in Las Vegas constituted evidence of surveillance in contemplation of terrorist acts.[98] The prosecutor suppressed evidence from the Las Vegas FBI and the Las Vegas U.S. Attorney's Office that contradicted the prosecutor's claim, asserting instead that the video was not a surveillance tape but merely a tourist video.[99] In fact, those agencies had specifically asked the prosecutor to provide evidence as to why he considered the tape to be surveillance.[100]

Moreover, contrary to the prosecutor's claim that the audio portion of the tape contained Arabic that was relatively easy to understand,[101] the prosecutor was in possession of a government communication detailing the difficulty of translating the "audio portions of the videotape due to" the unusual Tunisian or Algerian dialect being spoken.[102] According to the communication, Government

95. *Id.* McNair obtained opinions from the CIA's Counter Terrorism Center, as well as document analysts at the CIA, and CIA "paramilitary people." *Id.* McNair "shared these opinions with AUSA Convertino over the course of approximately five to ten [telephone] conversations," advising him that "it was the collective opinion of the people with whom he discussed the sketch that the sketch was not a very good work product." *Id.* at 36.

96. *Id.* at 36. According to McNair, "Convertino was not really asking for the CIA's opinion; he was stating that he thought the drawings were casing sketches of the Incirlik Airbase and insisting that his case rested on that assessment." *Id.*

97. *Id.* (quoting McNair's Decl.). During the post-trial investigation, Convertino denied McNair's statements and alleged that McNair "is retaliating against Convertino out of spite." *Id.* at 36 n.21. Convertino has also urged that even if McNair did make the statements to Convertino (which other witnesses confirm that McNair did make), Convertino "would not have heard it because he believed McNair was incompetent and had tuned him out." *Id.*

98. *See supra* notes 39-41 and accompanying text.

99. *See* Government Motion, *supra* note 15, at 40. "According to an August 11, 2004 AP news article entitled *Vegas Police Say They Saw Terror Tapes*, a purported e-mail from Assistant United States Attorney Sharon Lever in Las Vegas to AUSA Convertino in the Fall of 2002 stated: 'The FBI here has looked at the tape. They said it is not a surveillance.'" *Id.* at 40 n.24. Similarly, "several law enforcement officials in Las Vegas determined that the videotape represented no threat to that city." *Id.* (referring to Steve Kanigher, *Debate Over LV Terrorism Allegation Intensifies*, LAS VEGAS SUN, Aug. 11, 2004, http://www.lasvegassun.com/sunbin/stories/sun/2004/aug/11/517322092.html). According to sources, the tape

> looked like a tourist video . . . . It did not have the type of detail you would expect to see in a terrorist tape, such as entrances and exits, parking garages and underground facilities. If you wanted to get the information seen on that videotape, you could have gotten that much information and more on the internet.

Id. at 40 n.24 (quoting Kanigher, *supra*).

100. *See* Government Motion, *supra* note 15, at 40. Neither of the Las Vegas assessments was furnished to the Court or defense counsel prior to trial. *Id.*

101. *See supra* note 41.

102. *See* Government Motion, *supra* note 15, at 41.

Arabic language specialists "[had] further advised that the dialect of the individuals in the video [was] that of Tunisian or Algerian, [which made] it even more difficult to transcribe."[103] Indeed, this was the same position advanced by the defendants at trial that the prosecutor challenged, namely, that the videotape was a tourist tape depicting a group of young Tunisians visiting notable United States attractions and containing language that was a mix of classical Arabic and a Tunisian dialect.[104] The defense had claimed, apparently correctly, that the Government translators had mistranslated critical portions of the videotape.[105]

B. *Suborned Testimony*

A prosecutor's constitutional and ethical duty to disclose materially favorable evidence to the defense includes the duty to ensure that his witnesses do not offer testimony that is false, misleading, or incomplete.[106] A prosecutor has a constitutional and ethical duty to correct such testimony so that the jury does not receive a false or misleading impression of the evidence.[107] As with the suppression of evidence, prosecutors have the ability to corrupt the fact-finding process by either knowingly soliciting false or misleading testimony or allowing a witness to give false and misleading testimony without correcting it.[108]

As noted above, the testimony of prosecution witnesses Ray Smith and Michael Thomas was at best misleading, and at worst untruthful.[109] But even more critical to the jury's determination was the testimony of Youseff Hmimssa. As the Government's memorandum acknowledged, the jury received false and misleading testimony from Hmimssa, who was the only witness who testified that the defendants were involved in terrorist activities.[110] Typically, the testimony of co-

103. *Id.* The communication stated that it would "forward a copy of the tape to the FBI . . . for enhancement, and locate a Language Specialist who is familiar with this specific Arabic dialect." *Id.*

104. *See supra* note 41.

105. *See id.* at 41-42. The defense claim has been confirmed by information recently obtained by the FBI that the video was taken of a young Tunisian, his brother, and a number of other Tunisian students as part of a University social club touring the United States. *Id.* The young man's description of the tour and the innocent manner in which the video was produced has been "deemed credible" by the FBI agents who interviewed him. *See id.*

106. *See* Mooney v. Holohan, 294 U.S. 103, 112 (1935) ("[D]eliberate deception of court and jury by the presentation of testimony known to be perjured . . . is . . . inconsistent with the rudimentary demands of justice.").

107. *See* Banks v. Dretke, 540 U.S. 668, 694 (2004) ("Farr repeatedly misrepresented his dealings with police; each time Farr responded untruthfully, the prosecution allowed his testimony to stand uncorrected.").

108. *See* Barbara A. Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1151 (1982) ("In terms of truth-seeking, there is frequently no real difference between the jury's hearing perjury and its failing to hear significant favorable evidence.").

109. *See supra* notes 25-31 and accompanying text.

110. *See* Government Motion, *supra* note 15, at 42-49. The trial judge also found Hmimssa was "not credible" during his testimony at the December 12, 2003 hearing. *Id.* at 2 n.1.

operating witnesses such as Hmimssa has a powerful impact on the jury. No other witness has such an extraordinary incentive to lie.[111] For the prosecutor, the cooperating witness often provides the most damaging evidence against a defendant, is usually capable of lying convincingly, and typically is believed by the jury.[112]

There is ample evidence that the prosecution concealed from the jury information suggesting that Hmimssa gave untruthful testimony. An undisclosed letter to the prosecution from a prison inmate, Milton "Butch" Jones, related a series of jail house conversations with Hmimssa in which Hmimssa made statements that contradicted much of his testimony.[113] Hmimssa portrayed himself on the witness stand as a person sympathetic to the United States.[114] However, Jones claimed that Hmimssa bragged about "fooling the FBI and the Secret Service," "expressed hostility toward President Bush and Attorney General Ashcroft, asserted that God would punish the United States for its actions in Afghanistan, indicated a desire to hurt the United States economy through fraud, [and] boasted" that he sold false identification documents to the September 11 hijackers.[115]

Other undisclosed evidence corroborates Jones' statement that Hmimssa "harbored anti-American views and . . . vehemently opposed the United States' involvement in Afghanistan." For example, the prosecution did not disclose a copy of a newspaper article found in the trash at Hmimssa's apartment as a "photograph of Northern Alliance fighters over which was written 'BAD MUSLIMS.'"[116] Also not disclosed was the identity of a witness, the manager of the apartment where Hmimssa lived, who stated that Hmimssa told him: "Any soldier who lands in Afghanistan will die."[117]

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111. *See* Hoffa v. United States, 385 U.S. 293, 311 (1966); On Lee v. United States, 343 U.S. 747, 757 (1952).

112. Yaroshefsky, *supra* note 6, at 918-21 (describing dangers of using cooperating witnesses from extensive interviews with former federal prosecutors). It appears that the Detroit jury did not completely believe Hmimssa's testimony. In a telephone conversation with Richard M. Helfrick, Esq., attorney for defendant Koubriti, Mr. Helfrick suggested that in post-trial interviews, some jurors had expressed reservations about Hmimssa's credibility. Moreover, after news stories revealed the government's doubts over Hmimssa's veracity, several jurors sought to speak to the trial judge to express concerns about their verdict. Telephone Interview with Richard M. Helfrick, Esq. (Oct. 7, 2004).

113. *See* Government Motion, *supra* note 15, at 44-45. "[T]he Criminal Chief of the Detroit U.S. Attorney's Office described the need to disclose this [letter] to the defense as a 'no brainer.'" *Id.* at 44 (quoting 12-12-03 Tr. 71 (Allen), 83 (Gershel)). The court observed that this letter "clearly contains . . . exculpatory and impeachment material," and that "there is 'no question in the Court's mind that this document should have been turned over.'" *Id.* at 44-45 (quoting 12-12-30 Tr. 167).

114. *See supra* note 46 and accompanying text.

115. *See* Government Motion, *supra* note 15, at 44.

116. *Id.* at 45.

117. *Id.* Hmimssa also may have given false testimony when he stated that defendant Elmardoudi had given him a flight school visa so that Hmimssa could learn the necessary flight codes and flight school information in order to create false flight school visas for terrorists in the future. However, the testimony of other witnesses suggests that Hmimssa received visas from them for the purpose of falsifying them to enable these people to obtain employment. *Id.* at 26.

The impact on the jury of Hmimssa's testimony was aggravated by the prosecution's conduct in eliciting testimony from Hmimssa suggesting his courage and resolve in cooperating with the Government against the defendants. Thus, in response to the prosecutor's questions, Hmimssa acknowledged that he was putting his life in danger by testifying.[118] Hmimssa also testified that he was escorted by sixteen United States marshals and had to wear a bulletproof vest.[119] He further testified that when he got out of jail his life would be in danger from the defendants' worldwide network.[120]

C. *Eyewitness Testimony*

In addition to cooperating witnesses, other types of witnesses pose difficult fact-finding challenges for even the most conscientious and intelligent jury. Identification witnesses have been viewed as among the most inherently unreliable witnesses.[121] The United States Supreme Court has described the danger posed by identification witnesses: "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification."[122] Commentators have suggested that mistakes by identification witnesses may be the single largest cause of jury error.[123]

There is ample evidence to suggest that the identification testimony of Caroline Fuhr Sadowski was mistaken. It was critical for the prosecution to establish some connection between the defendants and Ali Ahmed in order to support the theory that Ali Ahmed had been duped into signing the notebook containing the two sketches. The prosecution knew that the local police had investigated this incident, and that Thamis Zaia had called the police admitting he was the person who purchased the cigarettes.[124] The prosecution also knew that

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118. *See* Defendants' Motion, *supra* note 62, at 33.

119. *Id.*

120. *Id.* It is not clear how much weight the jury gave to Hmimssa's testimony. Post-trial interviews with jurors suggest that the jury accepted Hmimssa's testimony only "when it was corroborated by other evidence." Ronald J. Hansen, *Jury Weighs Key Witness Testimony Lightly; Jurors Examined Case on Its Merit, Ignored the Charged National Backdrop, They Said*, DETROIT NEWS, June 4, 2003, at 6A.

121. FELIX FRANKFURTER, THE CASE OF SACCO AND VANZETTI 30 (1927) ("[T]he identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials."); Jennifer L. Devenport et al., *Eyewitness Identification Evidence, Evaluating Commonsense Evaluations*, 3 PSYCHOL. PUB. POL'Y & L. 338 (1997) (noting that "both archival studies and psychological research suggest that eyewitnesses are frequently mistaken in their identifications").

122. United States v. Wade, 388 U.S. 218, 228 (1967).

123. Rattner, *supra* note 6, at 289 (describing a study of more than two hundred felony cases of wrongful conviction that found misidentification to be the single largest source of error, accounting for more than half of the cases that had one main error).

124. Defendants' Motion, *supra* note 62, at 30 ("The Government knew that the local police had conducted an investigation of this incident" and "knew that Thamis Zaia had called the Farmington Hills police and admitted he was the person with Ali Ahmed at Sam's Club."); *see also* Government Motion, *supra* note 15, at 54-55 (stating that since trial, Zaia has told agents

Zaia had a history of illegal activity involving cigarettes.[125] Sadowski's positive identification of defendant Koubriti as the man with Ahmed at Sam's Club is inconsistent with information known by the prosecution that suggested that Zaia was the person who accompanied Ahmed.

D. *Partisan Experts*

A prosecutor's use of experts typically provides the government with distinct advantages.[126] "First, in contrast with other types of witnesses, the expert usually is viewed by the jury with an 'aura of special reliability and trustworthiness.'"[127] Second, the expert usually possesses impressive credentials, which the prosecutor meticulously elicits and that reinforce the jury's confidence in the expert's opinion. Third, the expert usually is adept at testifying, and communicates her theory and conclusions articulately, persuasively, and in language that lay jurors can understand. Fourth, the expert's conclusions invariably interlock with other evidence in the case and corroborate the prosecution's theory of guilt. Thus, the expert, more than any other witness who testifies in a United States courtroom, possesses the greatest capacity to mislead the jury. In tandem with a prosecutor who zealously seeks a conviction, the expert can often secure that conviction.

Special FBI Agent Paul George, who testified as a "summary expert," clearly made a powerful impression on the jury. Relying on the sketches, videotape, and Hmimssa's testimony, George opined that the defendants operated a terrorist cell that was "going to strike out against, against the United States and abroad."[128] He described the sketches and videotape as "casing material" that "clearly shows this is a repository of intelligence [containing] operational terrorist material."[129] George also "testified that [defendant] Koubriti had a 'leadership role' based on [his] 'language abilities' and 'leadership personality.'"[130] Relying on the testimony of Hmimssa that Koubriti threatened to kill him if he was an informant, George opined that "[l]eaders will react more impulsively. This, again, is why they are leaders . . . ."[131] George further testified that defendant Mardoudi also had a leadership role "based on his ability to communicate inter-

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who were unaware of Zaia's involvement in the Koubriti matter "that he was present with Ali Ahmed at Sam's Club and that Koubriti (whom Zaia does not know) was not").

125. Government Motion, *supra* note 15, at 54.

126. Bennett L. Gershman, *Misuse of Scientific Evidence by Prosecutors*, 28 OKLA. CITY U. L. REV. 17, 29 (2003).

127. United States v. Amaral, 488 F.2d 1148, 1152 (9th Cir. 1973).

128. *See supra* note 20 and accompanying text.

129. *See supra* notes 22-23 and accompanying text.

130. *See* Government Motion, *supra* note 15, at 12 n.4 (quoting 25 Tr. 4516-17).

131. *Id.* (quoting 25 Tr. 4518).

nationally." He characterized defendants Hannan and Ali-Haimoud "as simply involved group members."[132]

George's analysis, in retrospect, seems ludicrous. Indeed, as the Government has conceded, subsequent events have "undermined each part of [his testimony]."[133] It appears that he gave the prosecution the "expert opinions" that it wanted to hear.[134] Moreover, the basis for his opinions is almost laughable. George explained that he reached his opinions by asking whether the sketches "could be a casing sketch," whether the sketches "were consistent with a place in the real world," and whether the sketched location "[was] a possible terrorist target."[135] Whereas to some observers the drawing looked like childish doodles,[136] George concluded that the "drawing looked like it depicted something that could exist."[137] As the Government's memorandum observed, however, George's three-step formula presumably would have led him to characterize a child's sketch of the Empire State Building as an "operational terrorist casing sketch."[138] Finally, as the Government has acknowledged, the "vulnerability" of George's analysis is further underscored by the failure of George to evaluate the training level of the sketch artist, one of the bases upon which the Turkish National Police and the CIA discounted the sketches as terrorist-related.[139]

E. *Coaching Witnesses*

Witness coaching has been described as the "dark"—some have even called it "dirty"—secret of the United States adversary system.[140] It is a practice that, more than anything else, has given trial lawyers a reputation as shifty, and is maybe solely responsible for producing erroneous verdicts.[141] It is indisputable that some prosecutors coach witnesses with the deliberate objective of presenting false and

132. *Id.* (quoting 25 Tr. 4516).

133. *Id.* at 13.

134. *See supra* notes 89-97 and accompanying text.

135. *See supra* note 23 and accompanying text.

136. *See* Government Motion, *supra* note 15, at 32-33 (Agent Thomas allegedly was informed by Nasser Ahmed, a Yemeni man, that his mentally unstable brother, Ali Ahmed, might have been doodling in the day planner and drawn a sketch of the Middle East.).

137. *See id.* at 15 (quoting 25 Tr. 4538-39).

138. *See id.* at 15, 16 n.6.

139. *See supra* note 93 and accompanying text.

140. *See* John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277, 279 (1989) ("Witness preparation is treated as one of the dark secrets of the legal profession."); Roberta K. Flowers, *What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 MO. L. REV. 699, 740 (1998) (describing witness preparation as "The Profession's Dirty Little Secret").

141. *See, e.g.*, Bennett L. Gershman, *Witness Coaching By Prosecutors*, 23 CARDOZO L. REV. 829 (2002) (analyzing the incentives for prosecutors to coach witnesses and discussing methods of detection and prevention).

misleading testimony.[142] And given the secrecy surrounding the prosecutor's preparation of his witnesses, it is virtually impossible to ascertain whether and to what extent witnesses have been coached by prosecutors and police.[143]

It appears that the prosecutor shaped the testimony of several of his witnesses by improper coaching tactics. For example, during his direct examination of witnesses, the prosecutor elicited highly prejudicial testimony that the witnesses were being given special security protection.[144] Such inflammatory testimony was obviously planned in advance and had the logical effect of prejudicing the jury either consciously or unconsciously. Indeed, the security measures described by Hmimssa could reasonably have led the most fair-minded jury to believe that the United States Marshal Service was convinced a terror network connected to the defendants was attempting to intimidate Government witnesses and posed a real threat to Hmimssa and the members of the jury.

In addition, the evolution over time of Hmimssa's testimony provides a strong reason to believe he was coached to improve his testimony. As described in the Government's memorandum,[145] Hmimssa, in an early version of his story, stated that the defendants were going to purchase weapons from a "black male in Detroit."[146] A second version changed and amplified his story, so that he now stated that a "black muslim male in Detroit was going to purchase and ship weapons to the GIA [a terrorist group] in Algeria."[147] A third version added the word "brother" from whom the defendants were going to purchase weapons; the term "brother," according to Hmimssa, was used to define Islamists who are politically active.[148] In addition,

142. *See, e.g.*, Banks v. Dretke, 540 U.S. 668, 675 (2004) (prosecutor suppressed evidence that "witness' trial testimony had been intensively coached by prosecutors and law enforcement officers"); Kyles v. Whitley, 514 U.S. 419, 443 (1995) (noting that the differences between the original story and the trial testimony of the prosecution's key identification witness would have raised "a substantial implication that the prosecutor had coached him to give it."); Alcorta v. Texas, 355 U.S. 28, 30-31 (1957) (witness's misleading testimony obviously coached by prosecutor to avoid damaging implications); Walker v. City of New York, 974 F.2d 293, 295 (2d Cir. 1992) (accomplice's false testimony undoubtedly resulted from careful coaching by prosecutor).

143. Gershman, *supra* note 141, at 851 (explaining the difficulty presented by the absence of any verbatim record or other documentation of interview sessions as well as limited capacity of cross-examination to expose improper witness preparation).

144. *See* Defendants' Motion, *supra* note 62, at 34.

145. *See* Government Motion, *supra* note 15, at 48 n.31.

146. *Id.* at 48 n.31. Hmimssa stated, "Koubriti, Hannan and Ali-Hammoud all wanted to train for Jihad in the U.S. In particular, Ali-Hammoud said he had seen a cache of weapons from a *black male* in Detroit and was going to purchase weapons, including fully automatic machine guns." *Id.*

147. *Id.* Hmimmsa stated, "Koubriti, Hannan and Ali Hammoud all wanted to train for Jihad in the U.S. In particular, Al-Hammoud said he had seen a cache of weapons from a *black Muslin male* in Detroit and was going to purchase *and ship weapons to the GIA in Algeria*, including fully automatic machine guns *and weapons with laser sights*." *Id.*

148. *Id.* at 49. Hmimssa stated, "Koubriti, Hannan and Ali-Hammoud all wanted to train for Jihad in the U.S. In particular, Ali-Hammoud said he had seen a cache of weapons from a

Hmimssa's versions changed to excise earlier statements that suggested that the defendants were involved in alien smuggling, not terrorist attacks.[149]

F. *Obstructing Cross-Examination*

Cross-examination is assumed to be the most important adversarial safeguard to ascertaining the truth.[150] One of the principal techniques of cross-examination is to confront a witness with statements the witness may have made prior to trial for the purpose of demonstrating that the witness previously said something that is inconsistent with his trial testimony and, therefore, the witness is not trustworthy.[151] For this purpose a prosecutor is legally obligated to disclose prior statements by his witness to the defense.[152] If a prosecutor limits the availability of such prior statements, the prosecutor has effectively prevented the defense from demonstrating the unreliability of the witness and consequently impedes the ability of the jury to make an accurate assessment of the witness's credibility.[153]

The prosecution's nondisclosure of critical evidence bearing on Hmimssa's credibility was compounded by its decision to limit the transcription of statements made by Hmimssa during debriefings after he began to cooperate with the Government. As the Government's memorandum acknowledged, "[T]he [prosecutor] made a deliberate decision not to have the FBI take any notes or prepare any memo-

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brother in Detroit and was going to purchase and ship weapons to the GIA in Algeria, including fully automatic machine guns and weapons with laser sights." *Id.* (quoting 14 Tr. 2465).

149. *Id.* Hmimssa omitted in his final version a reference to the defendants' "smuggl[ing] people from Canada to the U.S. via boat," thereby giving the impression that the defendants were casing the Ambassador Bridge not for the purpose of alien smuggling but to further a terrorist attack. *Id.* at 49 n.31.

150. 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367, at 32 (James H. Chadbourne rev., 1974) (describing cross-examination as "the greatest legal engine ever invented for the discovery of truth").

151. *See* 2 MCCORMICK ON EVIDENCE § 33, at 122-25 (John W. Strong ed., 5th ed. 1999) ("most frequently employed" impeachment technique is proving "that the witness on a previous occasion has made statements inconsistent with his present testimony").

152. *See, e.g.*, The Jencks Act, 18 U.S.C. § 3500 (1993). Under the Jencks Act, these statements include (1) written statements made by the witness that are "signed or otherwise adopted or approved" by the witness; (2) statements that contain a "substantially verbatim recital of" any oral statement made by the "witness and recorded contemporaneously with the making of such statement"; or (3) a statement made by the witness to a grand jury. *Id.* § 3500(e). Due process also requires disclosure of witness statements which relate to the witness's testimony and are materially favorable to the defendant either to impeach the witness or exculpate the defendant. *See* United States v. Bagley, 473 U.S. 667, 675 (1985).

153. Neither the police nor the prosecutor has any legal obligation to record witness interviews. United States v. Bernard, 625 F.2d 854, 859-60 (9th Cir. 1980). Some prosecutors and police as a matter of policy do not take notes specifically to avoid creating contradictory evidence. Yaroshefsky, *supra* note 6, at 961 (Prosecutors commented that the office lore is "don't take too many notes or figure out how to take notes so that they are meaningful to you and no one else. You do not want a complete set of materials that you have to disclose."). Moreover, notes may be withheld from the defense even if they contain significant impeachment evidence when it is shown that the notes are selections, summaries, or interpretations by the government agent. *See* Palermo v. United States, 360 U.S. 343, 349-50 (1959).

randa of these sessions in order to limit defense counsel's ability to cross-examine Hmimssa."[154] "There were at least 10 undocumented interviews" with Hmimssa "that took place over 20 to 30 hours."[155] The prosecutor took his own notes but then claimed that all interviews with Hmimssa were for "'witness preparation' and that his own notes were privileged and not discoverable."[156]

Moreover, in response to defense complaints about the Government's failure to document the interviews with Hmimssa, several prosecution witnesses gave the misleading impression that their note-taking practices "followed normal government procedures," and they denied, falsely, that they were instructed by the prosecutor not to take notes.[157] As the Government's memorandum acknowledged, "[T]he [prosecutor's] approach to documenting Hmimssa's cooperation prevented defendants from determining the extent to which, if any, his testimony changed over time."[158]

G. *Inflammatory Arguments*

The prosecutor has a unique status in the eyes of the jury and therefore a unique opportunity to mislead and prejudice the jury. Because the prosecutor is the attorney for the government, he ordinarily is viewed by the jury as a highly knowledgeable official "who can be trusted to use the facts responsibly."[159] Courts have recognized the jury's respect for the prosecutor's prestige and expertise, and the jury's confidence in the prosecutor's judgment rather than its own view of the evidence. The United States Supreme Court has observed that "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence."[160]

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154. *See* Government Motion, *supra* note 15, at 46. Apparently agents took notes of early "proffer" sessions with Hmimssa. However, "once [he] began cooperating in mid-March 2002, the . . . agents did not take any notes or prepare any . . . memoranda." *Id.* at 46 n.28 (citing 8 Tr. 1253-54).

155. *Id.* at 46, n.28 (quoting 8 Tr. 1253).

156. *Id.* at 46. "Likewise, Hmimssa was not called before the Grand Jury" and therefore gave no documented prior testimony. *Id.* Apparently the prosecutor was "cautioned" against this approach by officials in the Justice Department and the Detroit United States Attorney's Office. *Id.*

157. *Id.* at 47 (citing 9 Tr. 1369, 26 Tr. 4667-73, 8 Tr. 1177). Although Thomas specifically denied being instructed not to take notes, Agent George recently indicated, in direct contrast to Thomas's trial testimony, that the prosecutor did specifically direct Thomas not to take notes. *Id.* (citing 3/17/04 George Statement, at 8).

158. *Id.* at 48. Moreover, "although [the prosecutor] provided the [trial] court with a version of his typewritten notes, other typed versions . . . recently surfaced." *Id.*

159. Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 315 (2001).

160. United States v. Young, 470 U.S. 1, 18-19 (1985); *see also* United States v. Modica, 663 F.2d 1173 (2d Cir. 1981).

> The prosecutor is cloaked with the authority of the United States Government; he stands before the jury as the community's representative. His remarks are those, not simply of an advocate, but rather of a federal official duty-bound to see that justice is

As the Government's memorandum acknowledged, the prosecutor's arguments to the jury were indefensible and had the potential to mislead and inflame the jury.[161] Although there was no evidence that the defendants committed terrorist acts or were tied to any specific terrorist organization, the prosecutor in his opening statement referred to the defendants as a "'shadowy group' that 'stayed in the weeds' [and were] 'planning, seeking direction, awaiting the call.'"[162] These comments, made at the outset of the trial, grossly misrepresented the evidence, and in a climate of fear and tension, were deliberately designed to prejudice the jury.[163]

Even more inflammatory were the prosecutor's insinuations during his summation that if the jurors did not convict the defendants, innocent people would perish.[164] The prosecutor stated: "Don't give these people another chance to make their plan effective."[165] Referring to the defendants' potential victims—i.e., "'the mother and father in the ride in the Disneyworld underground,' the 'soldier in Incirlik, Turkey, who takes a plane off,' 'the people from Amman, Jordan who go to that hospital,' 'the people in Las Vegas in the lobbies of hotels,' 'the person walking into the New York Times Building'"—the prosecutor insinuated, in clear violation of legal and ethical rules, that acquitting the defendants would invite the murder of these innocent people.[166]

IV. Conclusion

The Detroit terror case offers a unique opportunity to examine closely the vulnerability of the fact-finding process when an intrinsically fair-minded and conscientious jury is exposed extrinsically to untruthful, incomplete, and misleading evidence and argument. Given the Government's unusual concession that the defendants received an unfair trial, and its careful description of the quality of the evidence and the manner in which it was presented and argued, the conclusion is inescapable that any intrinsically competent jury will almost always make the wrong decision when its verdict is based on extrinsically defective information which the jury lacks the competence to expose.

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done. . . [I]t may be difficult for [the jurors] to ignore his views, however biased and baseless they may in fact be.

Id. at 1178-79.

161. *See* Government Motion, *supra* note 15, at 57-58.

162. *Id.* at 10-11 (quoting 8 Tr. 1023-24).

163. *See generally* Pyszczynski & Wrightsman, *supra* note 8 (describing impact of opening statements on mock jurors).

164. *See* Gershman, *supra* note 68, at §§ 11:2-11:10 (describing various arguments used by prosecutors to inflame fears, passions, and prejudices of the jury).

165. *See* Government Motion, *supra* note 15, at 57.

166. *See id.* at 57-58; Gershman, *supra* note 68, at §§ 11:4-11:5.

The Detroit terrorist trial contained many of the ingredients that produce a miscarriage of justice. The trial was conducted in a climate of fear; the jury was selected anonymously and subjected to intense pressure to convict; the evidence that the Government presented to the jury was fraudulent; and the prosecution used inflammatory tactics to incite the jury to convict. Undoubtedly, psychological investigations of the intrinsic factors that affect jury decision-making are useful. However, any close analysis of jury verdicts must focus on those extrinsic factors that relate to the quality of the evidence and the manner of its presentation. As the Detroit verdict unmistakably shows, even a qualified, diligent, and carefully selected jury will get it wrong when it is secretly misled and misinformed by a partisan advocate bent on winning at all costs.